

Mark I. Harrison, No. 001226
OSBORN MALEDON
2929 North Central Avenue
Twenty-First Floor
Phoenix, AZ 85012-2793
Phone: (602) 640-9324
Fax: (602) 640-9050
Email: mharrison@omlaw.com

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	Supreme Court No. R-11-0033
)	
PETITION TO AMEND ER 3.8 OF)	COMMENT OF LAWYERS IN
THE ARIZONA RULES OF)	SUPPORT OF PETITION TO
PROFESSIONAL CONDUCT (RULE)	AMEND ER 3.8 OF THE
42 OF THE ARIZONA RULES OF)	ARIZONA RULES OF
SUPREME COURT))	PROFESSIONAL CONDUCT
)	
)	

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the undersigned attorneys hereby file this comment in support of the Petition to Amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional Conduct filed on November 2, 2011. For the reasons that follow, we support the Petition and urge this Court to adopt the proposed amendment.

In 2008, the ABA adopted critical amendments to Model Rule 3.8, after consultation nationally with prosecutors, judges, and criminal defense practitioners, among others. The amendments give guidance to prosecutors in discharging their ethical responsibilities when they learn of new and probative evidence that an innocent person has likely been wrongfully convicted.

1 Owing to the nearly 300 (and counting) DNA exonerations and to the
2 lack of guidance currently supplied by the Model Rules of Professional Conduct
3 in likely cases of wrongful convictions, the Criminal Justice Section of the
4 ABA, together with ten additional organizational co-sponsors, petitioned the
5 ABA House of Delegates to amend Model Rule 3.8. The amendment
6 overwhelmingly passed the House of Delegates *without any opposition or*
7 *debate*. We support the amendment adopted by the ABA House of Delegates
8 and urge this Court to adopt the ABA's amendment, as judiciously modified in
9 the Petition,¹ for both the reasons listed in the Petition and the six reasons that
10 follow:

- 11 1. With so many criminal prosecutions occurring in this state (and
12 particularly in Maricopa County), it is inevitable that unfortunate
13 mistakes will happen. And although these mistakes are typically
14 unintentional, we find it self-evident that wrongful convictions are
15 travesties of justice and that the ethical rules should guide prosecutors
toward efficiently remedying these terrible mistakes.
- 16 2. Importantly, the proposed amendment does not require action in the face
17 of frivolous claims of innocence; in fact, the standard for action is very
18 high: the amendment not only requires "knowledge" of "new, credible
19 and material evidence" (each defined terms), but also requires that such
20 evidence create a reasonable "likelihood" that the person is actually
21 innocent of the offense. These high standards will limit the expenditure
of prosecutorial time and resources to only those cases raising serious
questions of actual innocence.
- 22 3. The amendment does not require the prosecutor's office to engage in
23 further investigation. In the relatively rare situations in which the rule is
24 triggered (see above), it requires only that the responsible prosecutor's

25
26 ¹ The modifications in the Petition were borrowed largely from the
27 amendment to the rule adopted in Colorado and are limited to helpful
28 clarifications of certain words and terms used in the amended rule.

1 office *request* an investigation. We thus see no basis to conclude that the
2 rule infringes on prosecutors' civil immunities.²

3 4. For over two decades, Arizona prosecutors have operated under ER
4 3.8(d), which requires broad disclosure of mitigating evidence pre-
5 sentencing, and the undersigned attorneys know of no instance in which
6 that ethical rule has been unreasonably enforced against prosecutors or
7 has otherwise hampered the administration of justice. In short, no skies
8 have fallen despite Arizona's employment of a *broader* rule for twenty-
9 plus years.³

10 5. The amendments have been already adopted or recommended by several
11 important states, such as California, Colorado, and New York.⁴

12 ² See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Connick v.*
13 *Thompson*, 131 S. Ct. 1350, 1362–63 (2011) (suggesting that, because
14 prosecutors are subject to professional discipline, there is little reason to impose
15 civil liability for failing to train subordinate prosecutors on their disclosure
16 obligations); see also ARIZ. RULES OF PROF'L CONDUCT Scope ("The Rules . . .
are not designed to be a basis for civil liability.").

17 ³ See ARIZ. RULES OF PROF'L CONDUCT ER 3.8(d) (requiring all
18 prosecutors to "make timely disclosure to the defense of all evidence or
19 information known to the prosecutor that tends to negate the guilt of the
20 accused or mitigates the offense, and, in connection with sentencing, disclose to
21 the defense and to the tribunal all unprivileged mitigating information known to
22 the prosecutor, except when the prosecutor is relieved of this responsibility by a
23 protective order of the tribunal"); see generally ABA Standing Comm. on
24 Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) (noting that Model
25 Rule 3.8(d) imposes more stringent disclosure obligations than those of the
26 Constitution).

27 ⁴ Several other states have adopted or are actively considering this
28 important amendment. North Dakota, for example, adopted the amendment
essentially in full a few months ago. See, e.g.,
<http://www.ndcourts.gov/court/notices/20110132/Rule3.8final.htm> (last visited
April 7, 2012).

6. Although the National District Attorneys Association’s ethical rules are nonbinding, we find it persuasive that the oldest and largest organization of prosecutors has recently adopted a similar rule.⁵

CONCLUSION

The Court should incorporate the ABA’s recent amendments to Model Rule 3.8 into our rules. Wrongful convictions unfortunately occur, and Arizona’s ethics rules currently provide very little guidance to prosecutors post-conviction. As noted in the Petition, these amendments pay overdue attention to the second half of the prosecutor’s “twofold aim”—“that guilt shall not escape *or innocence suffer*.”⁶

⁵ The full text of the proposed amended rule is as follows:

When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court and unless the court authorizes a delay, the defense attorney, or the defendant, if the defendant is not represented by counsel, and seek the release of the defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court and unless the court authorizes a delay, to the defense attorney, or to the defendant, if the defendant is not represented by counsel.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 8-1.8 (3d ed. 2009) (“Duty of Prosecutor in Cases of Actual Innocence”).

⁶ *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). As this Court has noted, the “prosecutor’s interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *In re Peasley*, 90 P.3d 764, 772–73 (Ariz. 2004) (internal quotation omitted).

1 **RESPECTFULLY SUBMITTED** this 4th day of May, 2012.

2
3 By /s/ Mark I. Harrison
4 **Mark I. Harrison, Esq.**
5 OSBORN MALEDON*

6 /s/ Terry Goddard
7 **Terry Goddard, Esq.**
8 SNR DENTON*

9 /s/ Grant Woods
10 **Grant Woods, Esq.**
11 GRANT WOODS LAW*

12 /s/ Stanley G. Feldman
13 **Chief Justice Stanley G. Feldman (ret.)**
14 HARALSON MILLER PITT FELDMAN &
15 McANALLY PLC*

16 /s/ Charles E. Jones
17 **Chief Justice Charles E. “Bud” Jones (ret.)**

18 /s/ Robert D. Myers
19 **Hon. Robert D. Myers (ret.)**

20 /s/ Thomas A. Zlaket
21 **Chief Justice Thomas A. Zlaket (ret.)**

22 Electronic copy filed with the Clerk
23 of the Supreme Court of Arizona
24 this 4th day of May, 2012.

25 ...
26 ...
27 ...

28 _____
* Institutional designations are for identification purposes only.

1 Copies of this Comment mailed
2 this 4th day of May, 2012, to:

3 Larry Hammond
4 ARIZONA JUSTICE PROJECT
5 c/o Sandra Day O'Connor College of Law
6 PO Box 875920
7 Tempe, Arizona 85287-5920
8 Email: lhammond@omlaw.com

9 Keith Swisher
10 PHOENIX SCHOOL OF LAW*
11 One North Central Avenue
12 Phoenix, Arizona 85004
13 Email: kswisher@phoenixlaw.edu

14 Karen Wilkinson
15 OFFICE OF THE FEDERAL PUBLIC DEFENDER*
16 850 West Adams Street
17 Phoenix, Arizona 85007-2730
18 Email: Karen_Wilkinson@fd.org

19 *Petitioners*

20 /s/ Joni J. Jarrett-Mason